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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL., APPELLANTS

v.

MYTINGER & CASSELBERRY, INC., A CALIFORNIA CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR APPELLANTS

The brief filed by appellee contains a great many inaccurate, half-accurate and misleading statements, some of which relate to possibly significant aspects of the case although most do not. In their totality, however, these misstatements may result in leaving a very erroneous impression of what actually occurred. Accordingly, it seems desirable to call the Court's attention to a number of such

statements both in order to set the facts straight in part and to show the general unreliability of appellee's brief.

1. *Reference to wrong section of bill.* The Government argued in its brief that the deletion from a part of the bill which became the Food, Drug, and Cosmetic Act of a provision for injunctions against multiple seizures was one of the factors which suggested that Congress did not intend the district courts to grant such injunctions (Government's main brief, pp. 53-54, 58). Appellee asserts (Br. pp. 6, 140-142), that we failed to quote a passage from a House Report which refutes this contention Appellee has not noted, however, that the passage to which it refers relates to an entirely different provision of the bill.

Our brief was concerned with the section of the bill specifically authorizing the district courts to restrain multiple seizures—the last paragraph (first (g) and then (f)) of Section 711). See S. 5, 74th Cong., as reported to Senate March 22, 1935, Dunn, *Federal Food, Drug, and Cosmetic Act*, p. 234. This paragraph was deleted by the House Committee, as indicated in our main brief. See Dunn, pp. 529, 558. Appellee's brief (pp. 139-140) refers to Section 702 of S. 5, the general judicial review provision. It was this general provision, which had novel features, which the same House Report eliminated, with the statement (quoted at pp. 141-142 of appellee's brief), that no new remedy

was necessary and that the remedy in equity would be available to correct unlawful and arbitrary administrative action. Subsequently a different provision for review of regulations by district courts was reported to the House as Section 701(f). (S. 5, 75th Cong., 3d Sess., as reported April 14, 1938, Dunn, p. 810), which in turn was superseded by the present Section 701(f), which provides for review by courts of appeals.

The history of the specific provision which would have allowed injunctions against multiple seizures, with the full quotation from the Committee report as to the reason for its deletion, is accurately set forth at pages 53 to 54 of the Government's main brief.

2. *Improper use of interrogatories.* In stating the "facts" of the case, and throughout its brief, appellee has treated its own answers to written interrogatories as evidence which must be taken to be true because offered by the appellants (appellee's brief, especially pp. 13-18, 24-27). Its excuse for this is that at the close of the trial counsel for appellants asked to have the written interrogatories asked of appellee and the answers thereto "read into the record" (R. 530-531).

Even if this be regarded as an introduction of the interrogatories as evidence—which it does not appear to be—it would not convert appellee's colorful accusations into facts, admitted or otherwise. For, as appellee's brief fails to state, the long list of

answers upon which it relies (Br. 24-26, 15-18, 52) were merely responsive to the question (R. 531):

> (1) In what way *is it claimed by you* that these defendants or any of them have abused their power in violation of the due process clause of the Fifth Amendment? [Emphasis added.]

Appellee's answer to this question merely presented a statement of appellee's claims, as in a bill of particulars.[1] Introduction into the record of the question and answer together would admit at most that such were appellee's claims, not that the claims were factually true. Obviously, the Government was not, by the process of reading the question and answers into the record, admitting such charges as that it had rendered "three secret unlawful decisions in September and December 1948, that the labeling of plaintiff's product was misleading" (R. 532). The answers to the interrogatories are replete with legal conclusions and argumentative characterizations—"secret", "deliberate", "arbitrary", "unreasonable", "untrue", "oppressive" —which are not supported by any evidence in the record.

Apart from the fact that the answers on their face stated claims, not facts, such self-serving statements and conclusions would not have been binding upon the adverse party in any event. Federal Rule

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[1] Appellants were seeking merely to determine what issues they would be required to meet at the trial. Cf. *Hickman* v. *Taylor*, 329 U.S. 495, 501.

of Civil Procedure 33, as amended in 1946, provides that answers to interrogatories "may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party". Rule 26(d)(2) permits the use against a party of his deposition or that of an officer of a corporation which is a party. Rule 26(f) then provides:

> (f) EFFECT OF TAKING OR USING DEPOSITIONS. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, *but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule.* At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. [Italics supplied.]

See 6 Cyc. Fed. Proc. (2d Ed.) § 2558.

Obviously the answer to an interrogatory by one party, by whomever introduced, is not to be treated as an admission by his adversary, any more than the use by one party of the deposition of another. Although Rule 33 does not specifically state that interrogatories are controlled by Rule 26(f) as well as by Rule 26(d), the same principle must obviously govern.

For these reasons the assertions of appellee's claims in its answer to appellants' interrogatory is not evidence of anything, and if it were it would not be binding upon the adverse party. To the extent that appellee's statements are not supported by references to *evidence* in the record, as distinct from these interrogatories, they should be disregarded.

3. *Misstatements as to availability of Kingsley and Butz.* Appellee asserts that the Government's two "most essential" witnesses, Acting Administrator Kingsley and Dr. Butz, who testified by deposition, were not shown to be unavailable[2] at the time of the trial. (Appellee's brief, p. 20). The attempted implications are not only that the depositions were improperly admitted but that the Government was afraid to call them as witnesses. A comparison of appellee's statements with the record is revealing:

Appellee's Brief	*Record*
p. 20 "But Kingsley was not called as a witness and was not claimed to	R. 516-518. In a colloquy as to whether Kingsley's deposition was par-

[2] Kingsley's deposition was introduced not only because Kingsley was in Europe at the time of the trial but because appellee had read part of his deposition into the record (R. 269-270), which in itself made it proper for appellants to introduce the remainder. See Federal Rule of Civil Procedure 26(d)(4).

Appellee's Brief

be unavailable to Appellants * * *."

Record

tial or complete, the following occurred:

"MR. KLEINFELD: It isn't partial. This is the deposition that Mr. Rhyne took. He never asked us to go any further. Mr. Kingsley was available that day up to the time he left the country.

* * *

"MR. RHYNE: * * * The only time it was ever discussed between counsel after that was when Mr. Kleinfeld, when this matter was originally scheduled for trial, asked that I waive the personal appearance of Mr. Kingsley and I didn't do it. Since then they advised me that he was in Geneva.

"MR. KLEINFELD: That is right.

"MR. RHYNE: And I believe that is all the information I have on it, and because of that

visit, I haven't tried to complete the deposition.

* * *

"MR. GOODRICH: May I explain the dates of Mr. Kingsley's absence, when he left the country? He left sometime in August. * * *

* * *

"Those are the dates involved. So several months intervened between the time the records were made available and Mr. Kingsley left the country.

"MR. KLEINFELD: Mr. Rhyne has never asked at any time to take a further deposition of Mr. Kingsley. If he had, we would very gladly have put Mr. Kingsley at his disposal."

It was also public knowledge that Mr. Kingsley had been elected Director General of the International Refugee Organization, with head-

Appellee's Brief *Record*

quarters at Geneva, and that he was to assume duties on July 31. *New York Times,* July 9, 1949, p. 4, columns 3-4; *Washington Post,* July 9, 1949, p. 7, columns 1-2.

p. 20 Appellants "* * * then advised the Court. that they *would not* call Butz as a witness (R. 391-392) although his address is given in a deposition taken for discovery purposes as Silver Spring, Maryland (R. 1175), and they did not say that he was unavailable to them as a witness. * * *"

R. 366:

"MR. GOODRICH: Your Honor, as I started to say, we told Mr. Rhyne that Dr. Butz had transferred from our organization into the Department of the Army, and is now not in Washington.

"The last time we heard from him, he was in Brook General Hospital in San Antonio, Texas."

4. *Misconception of Dr. Butz's function.* Appellee asserts that the findings of probable cause by the various administrative officials were based solely on Dr. Butz's findings. But the evidence shows that in coming to their conclusions, Crawford, Dunbar, Larrick and Kingsley also relied on their own consideration of appellee's booklets to determine what claims were made. (See Government's main brief, pp. 17-21, and pp. 15-18, *infra*). The attack on Dr. Butz and the importance attributable to him manifest appellee's

misconception—as well as that of the court below—as to the function of the medical officer in making the finding. It was his duty to inform his superiors as to the medical facts, i.e., what a product containing the ingredients of Nutrilite would or would not do. He found that such a product "would not be effective in preventing or treating most common diseases" (R. 1172), a fact which we do not understand appellee to dispute, and which is unquestionably true whether they deny it or not.

After receiving Dr. Butz's findings, the administrative officials personally examined the booklets to determine whether the appellee was representing to the public that Nutrilite would be effective in preventing or curing most common diseases. The decision as to what impression the booklets would make on the reader, a non-medical question and apparently the primary question in dispute, was not committeed to Dr. Butz.

5. *Appellee's concession of no general curative effect confirms Dr. Butz.* Appellee asserts (Br. p. 80) with respect to Dr. Butz, that "when his deposition was taken he very definitely repudiated many of the statements in the findings attributed to him (R. 762)."[3] A reading of Dr. Butz's testimony (R. 1175-1215) will demonstrate the error

[3] The finding cited (R. 762) states merely that "In the deposition he repudiated some of the statements in said findings." Although this, in itself, is erroneous, it does not support appellee's substitution of the word "many" for the word "some" used by the court.

in this contention.[4] But in any event, since Dr. Butz's ultimate finding was that Nutrilite would not prevent or cure most common diseases, a finding not retracted or refuted in the slightest, and since appellee and its witnesses have not claimed to the contrary in this litigation, the point seems academic. The following excerpts from the record and appellee's brief should be sufficient to show appellee's position:

> Dr. John A. Myers, appellee's medical witness (R. 106-7):
>
> A. There are many common diseases. Once they have been precipitated we do not offer to alleviate them. Vitamin deficiency disease is preventive medicine, not curative medicine. As we have mentioned all the way through the book, it does not effect a cure.

---

[4] In the court below appellee argued that Dr. Butz's first finding that Nutrilite "would not be effective in the treatment of" a long list of ailments had been impeached by his admissions that, when a patient had a vitamin deficiency, Nutrilite might be helpful in dealing with some of the ailments listed (e.g. R. 1214-1215), and that symptoms listed sometimes manifested a vitamin deficiency (e.g. R. 1192). But his testimony as a whole shows that such symptoms and ailments much more frequently had other causes, that vitamin deficiency diseases were not common, and that as a general matter treatment by Nutrilite would be ineffective. (R. 1202-3, R. 1207-8, 1214-1215). He summarized his "general position" as follows (R. 1202): "For instance, if you had a feeling of low vitality due to B-1 deficiency and you gave B-1, it might improve that. If it was specifically due to B-1. However, my general position in this is this, that the Nutrilite purports to treat a general subjective feeling of a large majority of the people that they have from time to time, and suggests to them if they take Nutrilite they will be better, which is not true."

Q. Do I understand your testimony now to be that this product won't cure any of these common diseases?

A. That is right.

[After being questioned as to numerous diseases]:

(R. 112):

I will sum that up for you, Mr. Goodrich, by saying that every one of the conditions that you have mentioned, I would say that vitamin pills alone will not help or cure.

(R. 127):

JUDGE CLARK: The doctor has testified, as to most of these things, that vitamin deficiency had nothing to do with them as to this time it has developed, and that taking vitamin pills wouldn't do any good to them. Isn't that your testimony as to most of these specific diseases?

The WITNESS: Yes, sir.

(R. 221):

MR. KLEINFELD (to witness Casselberry): Do you find anything in the medical excerpts before you that convinces you that Nutrilite would prevent or cure most common diseases?

MR. RHYNE: I object to that because he has never testified on direct or any other time that it would. * * *

JUDGE CLARK: I understand, Mr. Kleinfeld, but this book which is the subject of controversy doesn't make any contention that it will prevent or cure.

* * * * * * * *

Excerpt from letter from appellee's attorney, Lee J. Myers (R. 1031-1032):

"Nutrilite Products are foods for use as a supplement to the regular diet; they do not cure, and are not offered as a cure for anything; their chief purpose is that of a food—to nourish the body and to provide it with materials for its proper growth and function."

Excerpt from letter from appellee's attorney, Charles Rhyne (R. 1168):

You will search in vain in my client's booklet "How to Get Well and Stay Well" for any such claim that Nutrilite is effective in preventing or treating most common diseases.

Appellee's brief, p. 28:

Appellee has always contended that purchasers and consumers would not place the interpretation upon its pamphlets that Nutrilite is offered as a "cure" of diseases contended for by Appellants (Appellant's Brief 19, 20, 94). The pamphlets do no more than discuss diet and nutritional deficiencies due to the lack of vitamins and minerals in ordinary diets (Fdg. 12(e) (R. 759).

(p. 167):

* * * Dr. Myers said, in line with all the other credible testimony in the case, that Nutrilite is not represented in the pamphlets as a "cure" for any disease (R. 87).

It is clear that appellee was forced to disavow any curative effect for Nutrilite—despite the in-

consistent claims in the first two booklets, in particular (R. 1155-1156, 826-836)—because of its inability to substantiate such claims. In view of the Government's contentions, as to the meaning of the booklets, it is obvious that appellee would have defended on the ground disclaimed if it had dared to do so.

These disclaimers of curative effect for Nutrilite should be contrasted with Dr. John Myers' testimony that a person "would not be likely to buy an expensive preparation like Nutrilite or some other expensive preparation until his condition got very much worse" (R. 147)—which, of course, meant that he would only take it as a cure for something serious.

6. *Dr. Butz not merely a psychiatrist.* Appellee repeatedly refers to Dr. Butz as "a psychiatrist" (Br. pp. 20, 57, *inter alia*), in order to give the impression that he was unqualified in any other field. Although Dr. Butz had previously "specialized in psychiatry" (R. 328), he testified that he had an "MD degree" (R. 1475), that while in the Army "I was general medical officer part of the time, and I was assigned to neuropsychiatry a great deal of the time, which includes general medicine" (R. 1176); and that he had examined "several thousand" patients to determine whether, *inter alia*, they had vitamin and mineral deficiencies (R. 1178-1179, 1181).

7. *Extent to which officials read the booklets.* Appellee attempts (Brief, pp. 46-50, 21) to minimize the extent to which the four administrative officials read the booklets.

Commissioner Dunbar testified:

(R. 315):

> Q. Did you read all of the 42-page booklet?
>
> A. At that time I did not. I read many parts of the booklet and discussed the entire booklet with Mr. Murray, my assistant who had made a thorough review of the whole document, and who gave me a number of pertinent facts about the method of distribution, the sales technique, and also briefly on the previous seizure actions and what had occurred in the way of revision of booklets following those further seizure actions.

(R. 316):

> I then took the booklet, and without reading the entire 42 pages in detail, considered it—considered various pages to which Mr. Murray called my attention, as well as some that I was interested in myself in reading.

Associate Commissioner Crawford testified:

(R. 334):

> I scanned through the first part of the booklet up to something like page 36, I think it was, which was the prelude, we might say, to the final pages in the booklet beginning with

"What is the solution". I read from there on out, not in a scanning way at all, but thoroughly.

(R. 384):

Q. Your testimony is you merely scanned the first 36 pages?

A. Yes, but enough to get the meaning of it and the gist of it.

Associate Commissioner Larrick testified:

(R. 395):

Q. In reaching your determination of probable cause under the statute, did you read the entire 36-page booklet?

A. I did, in its entirety.

Acting Administrator Kingsley, who appellee repeatedly asserts (Br. 49, 50, 79) read "only one" version of the booklet, testified:

(R. 504):

I have read a pamphlet, "How to get well and stay well," which I have here, which is marked Exhibit A. * * * I may have read some other version of that at some other time, because it has gone through revision.

(R. 505):

I am uncertain as to what version I read, as a matter of fact, at the time at which Dr. Dunbar came to see me in January, whether it was his version or some other version——

(R. 513):

> Q. Mr. Kingsley, I note that you signed three decisions. Why was that? A. I believe the primary basis for that was change in the character of the labeling, that originally we had a 57-page pamphlet, that after the first seizures were made, and while the action was still in the court, a 36-page pamphlet was issued, of some other number, I have forgotten the number of pages, and more recently this 42-page one has been issued, which changed the facts to some extent, although not in my judgment in any material way.
>
> Q. Did you have all three of those before you at the time you signed this decision? A. I assume I did. I cannot say for a fact one way or the other. But I had some such pamphlet and I assumed that they were the right ones.

It should be noted that the first 36 pages of the three editions of the booklets involved were substantially the same.

8. *A comparison.*

Appellee's brief, (p. 43):	Appellee's 58- and 36-page booklets, p. 35 (R. 820, 881):
"For hour after hour, the Appellants took equally extreme positions in their cross-examination on other incurable diseases having scary unpronounceable	"Most of our common diseases, with the exception of germ diseases, but including some of the most painful, the most common causes of death from illness, those with

names which only the doctors ever heard of. (R. 92-183.) These names are not mentioned in the pamphlets, were undreamed of by its authors and no ordinary purchaser or consumer could possibly think the pamphlets promised that Nutrilite would 'cure' the diseases mentioned."

the weirdest names, many rare diseases, and many which are considered incurable, are the result of dietary deficiencies."

9. *The "surveys."* Appellee refers to the "surveys of purchasers and consumers" conducted by the Food and Drug Administration (Br. pp. 19, 4; but cf. pp. 55-56). These "surveys" consisted of a report by one Food and Drug investigator of his interviews with seven persons (R. 929-940). This report is described at page 24, note 10, of our main brief.

10. *Misstatement as to delaying tactics.* Appellee accuses the Government of "delaying, obstructive, punitive and other tactics outlined here which have delayed a decision for a year on the first motion to consolidate" (Brief, p. 96) and of "having tried every possible delaying technicality" (Brief, p. 83). There is no basis whatsoever for these statements. The condemnation suits were instituted between October 6, 1948, and January 4, 1949. The original complaint in the instant suit was filed

December 30, 1948 (R. 689). The delay in trying any of the condemnation or other suits against appellee has resulted from the pendency of the present litigation. Appellee has not moved for expedition, and the Government has not opposed expedition.[5]

Appellee's charge is apparently based upon the Government's refusal to *stipulate* to remove the cases to Los Angeles for a consolidated trial. It has been the Government's position that, as a matter of law, appellee was not entitled to have the cases tried in its home district (see Government's main Brief, p. 66, note 40),[6] and that, as a matter of general enforcement policy, it was not willing to consent to trial before a jury in that district. The Government has always conceded that under the statute appellee could as a matter of law consolidate in any of the districts in which condemnation proceedings had been instituted; the Government

[5] In the criminal proceeding pending with respect to appellee's first booklet, the Government did, on or about October 18, 1948, request postponing the determination of appellee's motion to dismiss until after the decision of this Court in the *Kordel* and *Urbuteit* cases (335 U.S. 345, 355), which had been argued on October 14, 1948, and which were decided on November 22, 1948 (R. 535-536, 264-265).

[6] The appellee suggests that Section 1404(a) of the new Title 28 allows a case to be transferred to its home district. (Br. 95). But that statutory provision only authorizes transfer of an action "to any other district or division where it might have been brought". As *United States* v. *23 Gross Jars * * * Enca Cream*, 86 F. Supp. 824 (N.D. Ohio) holds, articles found in one district cannot be seized in another district, and accordingly Section 1404(a) is inapplicable. Section 1404(b), which makes provision for transfer of proceedings in rem, "permits transfer of cases between divisions" of the same judicial district. See Reviser's Notes and case just cited.

has also been willing to stipulate for trial in a district adjacent to appellee's home district (R. 764, 1051). The Government's refusal to waive its statutory right not to consent to trial in the home district can hardly be regarded as an obstructive and delaying tactic.

11. *Misstatement as to "smearing publicity".* Appellee's brief refers to "the smearing publicity Appellants have released [as] grist for this defamation mill" (p. 85), "the publicity released by Appellants which accompanied these seizures" (p. 83), "the weapon of publicity" (p. 92), the "stigmatizing publicity actions of Appellants" (p. 159).

The only statement in the record relating to publicity is the following testimony of Casselberry (R. 66):

> Q. What about the publicity released by the Food and Drug Administration, what effect did it have?
>
> A. To answer that question, I must say that we can't be sure that the publicity was actually released by the Food and Drug, but publicity did follow in many cases where seizures were made, with the result that everybody in the community who was using Nutrilite learned that the product was being seized. They naturally assumed that the Government was right and we were wrong, so that led also to loss of many customers.

The fact that the institution of the condemnation suits received publicity hardly supports appellee's

statements. There was no evidence of any publicity released by the Food and Drug Administration at all.

12. *Misstatement as to testimony about "trace" elements.*

Appellee's Brief (pp. 134-135)

"The expert testimony *for both parties* below recognized that this base contains what has been termed 'trace' elements and that *the same are essential in human nutrition* (R. 163-4, 480, 1199, 1524). [Emphasis supplied.]

Record

DR. JOHN MYERS, Appellee's witness (R. 163-164):

"These people have attempted to put into it not only the crystalline vitamins that the experimentalists have found to be helpful in specific cases, but have added a concentrate of parsley, alfalfa, and watercress, very carefully concentrated to produce those things that we do not know about. They are so small that we cannot trace them. We know that they are specific and essential, but we do not know how or why they fit into the picture."

The testimony of appellants' witnesses at the pages cited was as follows: The closest per-

tinent passage on R. 1199 would seem to be the following:

DR. BUTZ:

"Q. Do you know that there are new vitamins being discovered all the time and that some of those could be contained in the base without your knowing it or my knowing it?

"A. That is true. That part of it is true."

DR. WALTER MYERS (R. 480):

"* * *

"Q. Have you ever heard of the trace vitamins and minerals?

"A. Yes, sir.

"Q. Do you know that they are contained in alfalfa, watercress and parsley?

"A. Yes, sir.

"Q. Do you think that they have no value in human nutrition?

"A. They have value, but we get them from other sources, when we

eat a reasonable diet of vegetables.

"Q. But your testimony is that you gave that base no value in your answers; is that right?

"A. I said it would not cure these various disorders."

DR. NELSON (R. 1524):

"Q. Is it possible that this base of alfalfa, parsley and watercress, which Nutrilite has and which is not contained in the other two products which you list in your affidavit, could mean that Nutrilite is more valuable in human nutrition than those other two products?

* * *

"THE WITNESS: I don't know. It may be a possibility."

Clearly, appellants' medical witnesses did not state that the so-called trace elements, which might be found in the base, were essential in human nutrition. And appellee's witness, who thought they

were, indicated that no one knew much about the elements in question.

Respectfully submitted,

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